United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 6, 2002

TO : Sandra L. Dunbar, Regional Director
Rhonda Aliouat, Regional Attorney
Charles Donner, Assistant to Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: HCA Genesis, Inc. d/b/a
Mercy of Northern New York
Case 3-CA-23442

512-5024-0100
512-5024-0150
512-5024-3300
512-5024-3500
512-5024-4133

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by videotaping the Union's portion of an Employer orientation for new employees. We conclude that the Employer violated Section 8(a)(1) because the taping interfered with the employees' participation in a protected activity and the Employer did not provide a proper justification.

FACTS

HCA Genesis, Inc., d/b/a Mercy of Northern New York (the Employer), is a long-term, geriatric healthcare and rehabilitation facility, and employs 425 employees. SEIU, 1199 Upstate, AFL-CIO (the Union) is the collective-bargaining representative for two units of the employees. Approximately once a month, the Employer conducts new employee orientation on its premises during regular business hours. During the orientation, the Union makes a presentation designed to familiarize the new employees with the benefits of joining the Union. In fact, the current agreement between the Union and the Employer, which is in effect from July 2001 until March 2004, includes a provision, Article 7.5, that states:

> The Union should be allotted thirty (30) minutes during new bargaining unit Employee orientation conducted by management, for a Unit officer or Steward to introduce the Union.

In 1999 during the Union's presentation portion of a new employee orientation, the Union presenters answered questions about bad publicity the Employer received in the newspapers. The Employer suspended the presenters. The Employer claimed the information provided by the presenters

might have scared off the new employees. Since then, the Employer has attended and observed the Union's presentations.

On December 29, 2001, the Employer notified the Union that it intended to videotape, in its entirety, the new employee orientation scheduled for January 7, 2002.[1] The Employer stated that it was taping the session as a "Quality Improvement Tool" to assist in identifying new topics for future educational needs. The Union objected to the Employer's intent to videotape the Union's portion of the session.

On January 7, before the presentation, the Union's chief steward again objected to the videotaping of the Union's portion of the session. The Employer told the chief steward that the presentation would be taped. As part of her introduction, the chief steward stated that the Union objected to the videotaping and apologized to the new employees. The chief steward assured the new employees that if they wanted to tell her anything that they did not want on videotape, they were free to see her at another time. After the presentation, the chief steward did not receive any questions from the new employees even though for the past several years the presenter normally received 10 to 12 questions per session.

On February 22, the Union filed an amended charge alleging that the Employer violated Section 8(a)(1) when it videotaped the Union's portion of session.

ACTION

We conclude that videotaping the Union's presentation at the Employer's orientation meeting interfered with Section 7 rights, and that creating a Quality Improvement Tool that would assist in identifying new topics for future educational needs did not constitute a proper justification for its conduct.

Casual observation of overt Section 7 activity is lawful.[2] However, even mere observation is unlawful if,

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[1] All dates hereafter are in 2002 unless otherwise noted.

[2] Brown Transport Corp., 294 NLRB 969, 972 (1989) (monitoring handbilling to insure the absence of traffic problem and attendant delays not unreasonable observation); Milco, Inc., 159 NLRB 812, 813-814 (1966), enfd. 388 F.2d 133 (2d Cir. 1968) (nothing unlawful about employer watching organizers in effort to correct slowing of traffic and organizers' trespassing).

unlike here, it amounts to coercive surveillance.[3] In addition, an employer may not videotape, photograph, or otherwise record employee Section 7 activity, because such surveillance has a tendency to intimidate employees and plant a fear of reprisal.[4] An employer needs "solid justification" to photograph or videotape employee Section 7 activity.[5]

The Board has found sufficient justification where an employer demonstrated a concern for safety,[6] a need to obtain evidence of unlawful activity,[7] or a need to obtain evidence to show a breach of contract.[8] The Board will not find justification where the employer's concern is not established by sufficient evidence.

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[3] Gainesville Mfg. Co., 271 NLRB 1186, 1188 (1984) (manager standing a few feet from union handbiller at public driveway, "obvious overt and intended surveillance of union activities"); Gupta Permold Corp., 289 NLRB 1234, n.2 (1988) (employer went beyond mere casual observation by simultaneously interfering with the distribution of union literature on public property).

[4] F.W. Woolworth Co., 310 NLRB 1197 (1993), citing Waco, Inc., 273 NLRB 746, 747 (1984) ("the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate").

[5] Saia Motor Freight Line, Inc., 333 NLRB No. 87, slip op. at 9 (2001), citing NLRB v. Colonial Haven Nursing Home, 542 F.2d 691, 701 (7th Cir 1976) ("the Board may properly require a company to provide solid justification for its resort to anticipatory photographing").

[6] Id., slip op. at 1 (surveillance justified when nonemployee union handbillers stationed in center of drive leading into freight terminal impeded traffic and raised safety and liability concerns).

[7] Concord Metal, 295 NLRB 912, 921 (1989) (photos taken to preserve evidence of secondary boycott activity and the blocking of ingress and egress, not unlawful surveillance).

[8] Roadway Express, 271 NLRB 1238, 1244 (1984) (employer photographing of strikers not unlawful surveillance because employer had colorable claim that they were breaching contractual no-strike clause and could thus seek injunctive relief under Boys Market exception to the Norris-LaGuardia Act).

In National Steel and Shipbuilding Co.,[9] the union began holding rallies before work in full view of the employer's guard shack at the entrance to the employer's facility. The employer decided to videotape these rallies citing a safety concern based upon prior employee misconduct during past strikes. The employer installed an additional fixed camera to "conspicuously document" the rallies, and also posted an additional security guard to carry a portable video camera. After two weeks of taping revealed no evidence of misconduct, the employer removed the additional security guard with portable camera, but continued videotaping the rallies with the additional fixed camera. The Board found the continued videotaping unlawful despite the employer's stated concern for safety.

The Board first noted that two weeks of videotaping failed to display any employee misconduct during the rallies. Since the employer removed the additional security guard with a portable camera at that point, the Board found insufficient evidence that the employer believed that employee misconduct would take place. The Board also noted that the guard shack had "an unimpeded view of the union rallies", as did the employer's regular security camera system. Id. at 501. The Board thus concluded that the employer failed to establish a safety concern as justification for the videotaping.

In the instant case, the Employer clearly had the right to be present for and to casually yet fully observe the Union's presentation, and the Union does not contend otherwise. In the above cited cases, where the protected activity was conducted in the open on public property, the employers also were validly present to casually observe that activity. The Board nevertheless required substantial justification whenever employers engaged in videotaping or picture taking in those cases because creating a permanent record of protected activity has a tendency to intimidate employees and plant a fear of reprisal.[10] Thus the Employer here also must show some justification for its videotaping other than its mere right to be present and observe.

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[9] 324 NLRB 499, 499-500 (1997).

[10] F.W. Woolworth and Waco, above, cited in fn. 4. The Board did not explicate the requirement of showing justification for videotaping protected activity. Rather, it apparently balances the employee right to engage in unimpeded protected activity against the employer's claimed business justification for the interference with that activity created by the videotaping or picture taking.

Assuming the Employer's educational concern is valid, this concern only justified taping the Employer's portion of its orientation. The Employer has not shown how the Union's presentation would involve subjects about which the Employer might need to educate employees in the future. To the contrary, the Employer is not responsible for educating employees on the benefits of Union membership or about internal Union affairs. Finally, even if the Union's presentation could have included subjects for future educational programs, the Employer has not shown why it was necessary to videotape the employees to obtain that information, and why mere observation of the Union's presentations, which the Employer had done in the past, was not sufficient to achieve its goal.[11]

Accordingly, we conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) because the taping interfered with the employees' participation in a protected activity and the Employer did not provide a proper justification for that interference.

B.J.K.

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[11] See National Steel and Shipbuilding, 324 NLRB at 501, where the Board relied in substantial part upon the employer's "unimpeded view" of the union rallies as "adequate to deal with any legitimate concerns" for employee safety.